



Legal Department

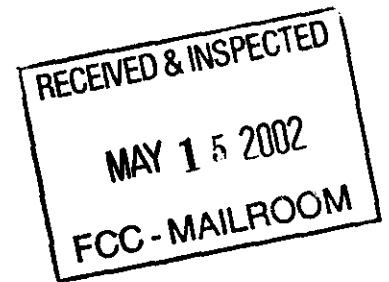
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May 13, 2002

Marlene Dortch, Secretary  
Federal Communications Commission  
Portals II  
445 12<sup>th</sup> Street, SW  
Suite TW-A325  
Washington, DC 20554



**Re: In the Matter of Winstar Communications, LLC  
Emergency Petition for Declaratory Ruling Regarding  
ILEC Obligations to Continue Providing Services**

**Verizon Petition for Declaratory Ruling Regarding  
CLEC Obligations to Cure Assigned Indebtedness**

**WC Docket No. 02-80**

Dear Secretary Dortch:

I have enclosed an original and four (4) copies of the Comments of Winstar Communications, LLC in the above-listed proceeding.

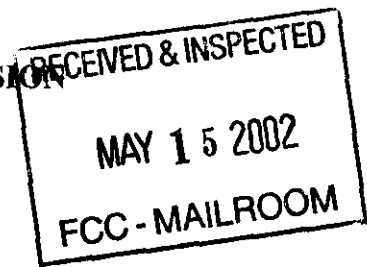
Please contact me at (973) 438-4854 if you have any questions regarding this filing.

Respectfully submitted,

Carl Wolf Billek  
Winstar Communications, LLC

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554



In the Matter of )  
 )  
Winstar Communications, LLC )  
Emergency Petition for Declaratory Ruling )  
Regarding ILEC Obligations to )  
Continue Providing Services )  
 )  
Verizon Petition for Declaratory Ruling Regarding )  
CLEC Obligations to Cure Assigned Indebtedness )

WC Docket No. 02-80

**COMMENTS OF WINSTAR COMMUNICATIONS, LLC**

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Winstar Communications, LLC  
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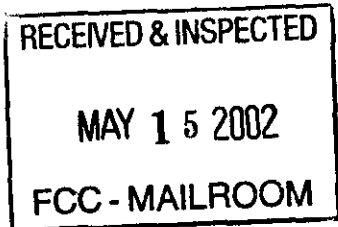
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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**



In the Matter of	)	
	)	WC Docket No. 02-80
Winstar Communications, LLC	)	
Emergency Petition for Declaratory Ruling	)	
Regarding ILEC Obligations to	)	
Continue Providing Services	)	
	)	
Verizon Petition for Declaratory Ruling Regarding	)	
CLEC Obligations to Cure Assigned Indebtedness	)	

**COMMENTS OF WINSTAR COMMUNICATIONS, LLC**

**INTRODUCTION AND SUMMARY**

Winstar Communications, LLC ("IDT Winstar") files its Comments in the above-mentioned docket pursuant to the Federal Communications Commission's May 3, 2002 *Public Notice*.<sup>1</sup>

In the "Comments and Counter-Petition of Verizon" ("Counter-Petition"), Verizon Communications, Inc. ("Verizon") poses questions so general that the Commission need not and should not answer them. To do so would be contrary to the Commission's long-standing policy to decline requests for declaratory rulings where the request is too abstract. Verizon's Counter-Petition does not even attempt to link two of the three questions propounded to the current controversy that it and other incumbent local exchange carriers ("ILECs") have occasioned by their threats to disconnect service.

A Commission effort to respond to Verizon in kind would be extremely damaging because it is certain that future controversies involving carrier bankruptcies will have different facts and will be placed, inevitably, in different, perhaps drastically changed, legal, technological, and industrial circumstances.

In the event the Commission declines to deny Verizon's Counter-Petition on the above stated ground, it should deny the Counter-Petition for the following reasons.

Verizon first asks the Commission to rule, "the Communications Act does not except carriers from the rights afforded by section 365 of the Bankruptcy Code."<sup>2</sup> The Commission should deny this request because the question raised by Verizon is not present in IDT Winstar's Petition and, as such, should not be addressed in Verizon's Counter-Petition. However, if the Commission decides to address the issue it should find that the relief requested in IDT Winstar's Petition may be granted under the facts presented without conflicting with any finding it might make on the issue presented by Verizon.

Verizon then asks the Commission to determine "where one CLEC wishes to take over another's service arrangement with nothing more than a name change, that constitutes 'an assignment or transfer' within the meaning of Verizon's tariffs, so that the assignee/transferee CLEC must assume the outstanding indebtedness of the prior CLEC for such services...."<sup>3</sup> The Commission should deny this request because it is nothing more than a transparent attempt by Verizon to take a second bite at the "assignment

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<sup>1</sup> *Public Notice*, "Wireline Competition Bureau Seeks Comment on Verizon's Petition for Declaratory Ruling Regarding ILEC Obligations To Continue Providing Services," DA 02-1017; WC Docket No. 02-80 (May 3, 2002).

<sup>2</sup> Comments and Counter-Petition of Verizon (April 29, 2002) at 27.

<sup>3</sup> *Id.*

apple.” However, even if the Commission were to consider Verizon’s Counter-Petition, it should deny the request on the grounds that IDT Winstar’s actions do not constitute “an assignment or transfer” within the meaning of Verizon’s tariffs. The Old Winstar/IDT Winstar transaction was not a “name change” consistent with the Commission’s use of the term “name change” within the context of a subscriber transfer. Additionally, if the Commission concludes that IDT Winstar’s acquisition of Old Winstar’s subscribers and the request for the continued use of the facilities that serve those subscribers is an “assumption” within the meaning of Verizon’s tariffs, it would eviscerate the Commission’s subscriber transfer regulations by effectively obliging most carriers that acquire subscribers from an ailing or bankrupt carrier to acquire the previous carrier’s debt associated with the subscribers. Moreover, because such a sea change in policy would not help Verizon achieve its alleged goal - making creditors whole - its implementation would not result in the benefit Verizon seeks. For these reasons, the Commission should conclude that IDT Winstar’s actions do not constitute “an assignment or transfer” within the meaning of Verizon’s tariffs.

Verizon also requests “to the extent it does not do so separately by issuing a clarification of its previous public notice reflecting the obligation of carriers to provide notice to affected customers, the Commission should clarify the circumstances under which carriers in bankruptcy are obligated to provide notice of possible discontinuance or transfer to their customers.”<sup>4</sup> Neither IDT Winstar’s Petition nor Verizon’s Counter-Petition raise the issue of whether Old Winstar acted in accordance in accordance with the Commission’s guidelines. Verizon’s request effectively serves as a request for

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<sup>4</sup> *Id.*

rulemaking or a motion for clarification and should thus be denied on the grounds of that it is procedurally deficient. In the event the Commission chooses to address the issue, IDT Winstar presents several issues and concerns the Commission should take into consideration. Furthermore, if the Commission make any findings as to Verizon's point, IDT Winstar requests that the Commission clarify that Old Winstar did not violate any newly created obligations and that these obligations only apply going forward, to carriers not yet in bankruptcy.

In conclusion, the Commission should deny Verizon's Counter-Petition on the grounds that it raises overly broad questions that are not related to the issues presented in IDT Winstar's Petition. If the Commission considers the questions raised, it should conclude that Verizon's requests should be denied on their merits. If the Commission were to grant any of Verizon's requests on the merits, it should still conclude that the facts presented in IDT Winstar's Petition are so different from the questions posed by Verizon as to permit the Commission to grant IDT Winstar the relief requested in its entirety.



## ARGUMENT

### **I. VERIZON'S COUNTER PETITION POSES QUESTIONS SO GENERAL THAT THE COMMISSION NEED NOT AND SHOULD NOT ANSWER THEM.**

The Commission has wide discretion in responding to requests for declaratory rulings. It need not and generally will not issue a declaratory ruling where the request is too abstract. Yale Broadcasting Co. v. FCC.<sup>5</sup> Verizon's Counter-Petition presents three questions, each of which is so broad as to preclude a useful answer. As articulated, they are not delimited by any specific facts whatsoever. An attempt to address them would risk fundamental damage to communications law and the pro-competitive, deregulatory policies the Commission has sought to foster. The attempt need not and should not be made.

The subject brought to the Commission's attention by IDT Winstar's Petition is Verizon's explicit threats to violate its duty to deal and to disconnect Old Winstar's customers' service rather than transfer them to IDT Winstar. The IDT Winstar Petition is predicated upon the need for an immediate and practical ruling foreclosing Verizon's threat. By contrast, the matters Verizon seeks to have addressed are so generalized that it is impossible to avoid the conclusion that they were raised in an effort to change the subject. The subject brought to the Commission's attention by Verizon's Counter-Petition, viewed most charitably, is the juxtaposition of communications and bankruptcy law. While not lacking in academic interest, the conceptual issues raised by Verizon do

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<sup>5</sup> 478 F.2d 594, 602 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973) (holding that the FCC did not abuse its discretion in declining to issue a declaratory ruling "in accord with the Commission's long-standing policy of refusing to issue interpretive rulings or advisory opinions whenever the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them"). See also Request for Declaratory Ruling by Harry Furgatch, 2 FCC Red. 1656, para. 3 (1987) ("In the interest of preserving its limited

not require, and would not permit, a ruling that is either immediate or practical. The only conceivable outcome of the exercise Verizon invites would be a list of self-evident considerations, pro and con, that ought to be weighed and applied if and when specific conflicts arise. Dealing with the questions that Verizon has presented would neither terminate a controversy nor remove uncertainty.

Verizon's Counter-Petition does not even attempt to link two of the three questions propounded to the current controversy that it and other ILECs have occasioned by their threats to disconnect service. The Counter-Petition makes a weak effort at relating terms of Verizon's Tariff F.C.C. No. 1 to the controversy,<sup>6</sup> but, of course, the applicability of the tariff is already in issue in connection with IDT Winstar's Petition. The inescapable conclusion is that the Verizon Counter-Petition adds nothing to resolution of the important question of whether Verizon and other ILECs will be allowed to make good on their threats to disconnect telecommunications service.

Review of the questions that the Counter-Petition puts forward leads to a further, more negative conclusion. A Commission effort to respond to Verizon in kind would be potentially extremely damaging because it is certain that future controversies involving carrier bankruptcies will have different facts and will be placed, inevitably, in different, perhaps drastically changed, legal, technological, and industrial circumstances.

Examining the issues Verizon has propounded individually shows that each is an inappropriate candidate for a declaratory ruling, as are the three of them collectively.

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resources, the Commission will not issue declaratory rulings to resolve abstract questions of law, without the requisite showing of a 'controversy' or 'uncertainty.'").

<sup>6</sup> Verizon Comments and Counter-Petition, at 26-27.

**A. The Communications Act Does *Not* Except Carriers From The Rights Afforded By Section 365 Of The Bankruptcy Code**

It is difficult to see how an unqualified answer to Verizon's first proposition would be useful to the resolution of IDT's Petition. It is easy to see how it would engender extensive controversy were the Commission's answer introduced in future bankruptcy proceedings where carriers are debtors or creditors.

Verizon's sweeping request seeks no less than an unqualified repeal of any allegedly implicated section of the Communications Act. Accommodating this request would violate one of the principal canons of statutory construction. First, the plain language of the laws must be examined to determine whether it repeals or otherwise modifies the other. Verizon has made no such showing here, and can make none – there is no such repeal provided for in Section 365 of the Bankruptcy Code. Second, the only time an agency should look beyond the plain meaning of a statute is when two laws come into apparent conflict. Again, even in the highly fact-specific record submitted with respect to IDT Winstar's Petition for a Declaratory Ruling, there has been no showing that there is any inconsistency between the unfettered right to reject or assume executory contracts given to debtors by the Bankruptcy Code and the unequivocal obligation of Verizon to provide services to another carrier under the Communications Act.

Nevertheless, Verizon's request goes beyond such a fact-specific inquiry and asks the Commission for an overarching declaration that in any conceivable future instance where Section 365 of the Bankruptcy Code and any section of the Communications Act come into apparent conflict, the Communications Act provisions have been repealed or otherwise do not apply. This is not a proper course for the Commission to take - both the

courts and the Commission have a duty to attempt to reconcile the statutes enacted by Congress, not assume that Congress intended for one statutory scheme to trump another. Repeals by implication are strongly disfavored and are found only in the event of irreconcilable conflicts. The courts' and the Commission's first resort must be to find an accommodation, not to issue blanket judgments that there has been an implied repeal. Only where that effort has failed and there is a plain repugnancy between statutory provisions may one be found to supercede the other.

The effort to discover whether there is a plain repugnancy is arduous and, normally, highly fact-specific. As the Commission is aware, the books are filled with decisions brought forward by exclusive jurisdiction motions. It would be very difficult to find many that have the abstract quality of Verizon's question. One good indication of the manner in which these types of jurisdictional issues are to be considered is evident in the primary jurisdiction referrals the Commission receives. The courts often resort to these referrals when it appears that the controversies before them implicate the Commission's jurisdiction or expertise. Unlike Verizon's first issue, the referrals are tied to the specifics of the case. What is wanted in these referrals is an application of communications law, regulation, and policy to the specific facts. What Verizon is asking for is a blanket statement that would, at best, constitute the beginning of a deliberation, not its conclusion.

Separate and apart from the methodological over-simplification Verizon's request presents, there is the extremely significant matter of the practical consequences of a blanket rule. Verizon makes no effort to advance its proposition as efficiency producing or as equity securing. There simply is no record, and no effort by Verizon to produce one,

addressing the broader societal welfare aspects of its proposition. Given the large and unknowable opportunities for misuse and confusion inherent in the statement Verizon seeks pursuant to this issue, the Commission should decline to provide it.

**B. Where One CLEC Wishes To Take Over Another's Service Arrangement With Nothing More Than A Name Change, That Constitutes "An Assignment Or Transfer" Within The Meaning Of Verizon's Tariffs, So That The Assignee/Transferee CLEC Must Assume The Outstanding Indebtedness Of The Prior CLEC For Such Services**

Unlike the other issues, Verizon's Counter-Petition at least attempts to tie its second proposition to the present controversy. However, only if the Commission treats Verizon's open-ended and argumentative statement as effectively modified by the entire record compiled in this docket, might it be possible for the Commission to supply an answer. However, it cannot do so because the issue of the meaning and effect of Verizon's tariff provision is *sub judice* before the Commission.

Little need be said about Verizon's second proposition. First, as is evident from the record, IDT Winstar disagrees fundamentally with the characterization "nothing more than a name change" as applied to its acquisition of the Old Winstar assets. Second and related, as to the merits of the proposition, IDT Winstar reverts to its pleadings in this docket. Third, the Commission should not miss the extraordinary irony in Verizon's asking it to declare what its tariff means in any given set of circumstances. If Verizon has to ask for clarification from the Commission, it is clear evidence that the tariff is impermissibly ambiguous. Fourth, if the Commission does not relate an effort to respond to Verizon's question to the specifics of record in this docket, it should not respond at all. To do so would be to risk the same kind of dangerously general statement that cannot be

avoided in connection with Verizon's other propositions, with the same kinds of unforeseeable consequences.

C. **To The Extent It Does Not Do So Separately By Issuing A Clarification Of Its Previous Public Notice Reflecting The Obligation Of Carriers To Provide Notice To Affected Customers, The Commission Should Clarify The Circumstances Under Which Carriers In Bankruptcy Are Obligated To Provide Notice Of Possible Discontinuance Or Transfer To Their Customers**

As with the other issues, Verizon seeks a blanket statement that will assuredly do more harm than good. The circumstances of carriers in bankruptcy are and will continue to be so varied that any effort to identify a precise point at which the Commission's various consumer information and protection requirements should be triggered is necessarily case-specific and therefore not susceptible to the type of general rulemaking advocated by Verizon.

In propounding this last proposition, Verizon finally achieves at least the appearance of disinterestedness. Unfortunately, it is not so. There is little that would be more beneficial to Verizon than replacing the present flexible obligation to proceed responsibly and in good faith with a rigid obligation that carriers in Chapter 11 advise their customers of possible discontinuance or transfer at an early point. The probable consequences of such a notice would be rapid implosion of the carrier,<sup>7</sup> the possibly unnecessary inconvenience of consumers, and a reduction in competition for the ILECs. Ultimately, there is no conceivable benefit to attempting to answer this request, and there

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<sup>7</sup> The failure of the carrier to emerge from bankruptcy or to maintain the value of its assets in the event of liquidation, of course, would reduce the amount of any recovery available to the ILECs as unsecured creditors. That they would want an early trigger on discontinuance notices suggests strongly that they value reduction in competition more highly than recovery of indebtedness.

is nothing like a record sufficient to permit the attempt. The Commission should decline the invitation.

In conclusion, IDT Winstar asserts that the Commission should deny Verizon's Counter-Petition in its entirety, as all three issues raised are overbroad and unrelated to the issues presented in IDT Winstar's Petition. Were the Commission to address the questions raised by Verizon, its decision would have an impact that far exceeds the scope of this proceeding while, at the same time, failing to address the specific issues raised by IDT Winstar in its Petition. Such an outcome is neither wise nor desirable. Therefore, as a matter of policy on declaratory rulings, IDT Winstar requests that the Commission deny Verizon's Petition in its entirety. In the event the Commission decides to address the issues raised by Verizon, IDT Winstar argues in the following sections that the Commission should not grant the requested declaratory rulings. Furthermore, IDT Winstar asserts that even if the Commission grants Verizon's requests, the requesting rulings would not afford Verizon the rights it seeks in its dispute with IDT Winstar, because the facts of the dispute do not conform to the questions posed by Verizon.

## **II. THE COMMISSION SHOULD DENY POINT ONE OF VERIZON'S COUNTER-PETITION**

Verizon first asks the Commission to rule, “the Communications Act does not except carriers from the rights afforded by section 365 of the Bankruptcy Code.”<sup>8</sup> The Commission should deny this request because the question raised by Verizon is not present in IDT Winstar’s Petition and should not be addressed in Verizon’s Counter-Petition. For example, in the present matter, the Bankruptcy Court has retained exclusive jurisdiction to interpret and enforce its own Sale Order, including the provisions of that order regarding rejection, assumption and cure. Additionally, under Section 365, Verizon is not entitled to the relief it seeks before the Commission. Also, Verizon’s tariff, and the facts of this proceeding are not consistent with Section 365. Ultimately, the Commission should decline to address the issue. However, if it decides to address the issue it should find that the relief requested in IDT Winstar’s Petition may be granted under the facts presented without conflicting with any finding it might make on the issue presented by Verizon.

### **A. The Bankruptcy Court Has Retained Exclusive Jurisdiction To Interpret And Enforce Its Own Sale Order**

Verizon is fully aware that Old Winstar rejected its agreements with Verizon. The Sale Order unambiguously provides that IDT Winstar is not a party to any rejected contracts and has no liability for any past defaults under those contracts. The Bankruptcy Court, not the Commission, should decide whether IDT Winstar’s actions somehow modify those clear provisions of the court’s order. The Commission should instead focus on the issue before it in IDT Winstar’s Petition: whether the refusal to provision the

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<sup>8</sup> Verizon Comments and Counter-Petition at 27.



former subscribers of Old Winstar (and the facilities that serve them) to IDT Winstar violates the Communications Act.

**B. Under Section 365, Verizon Is Not Entitled To The Relief It Seeks Before The Commission**

In the event the Commission decides to consider the issue raised by Verizon, it should conclude that the relief requested by IDT Winstar is not controlled by Section 365, thus making any decision on Verizon's Counter-Petition inapplicable to the matters raised in IDT Winstar's Petition. In support of this position, IDT Winstar has cited *In re Net2000 Communications, Inc., et al., Debtors*, Case No. 01-11324 (MFW) (Bankr.D.Del. Feb.13, 2002). There, Verizon contended that, because the purchaser of the services and facilities provided to the debtor under certain so-called "Verizon Contracts" was using those services and facilities, it therefore had assumed those contracts and was liable to cure the debtor's arrearages under those contracts pursuant to Bankruptcy Code § 365(b)(1)(A). The Bankruptcy Court held that the buyer had *not* assumed the contracts and was *not* obligated to cure the defaults thereunder.<sup>9</sup> In *Personal Computer Network*, Illinois Bell had threatened to terminate the use of specific telephone numbers by a third party purchaser of the assets of the debtors unless the buyer paid it the pre-sale amounts due from the debtors. The Bankruptcy Court ruled that Illinois Bell could not force the purchasing plaintiffs to pay the debtor's pre-petition debt or else have service terminated:

Bell's attempt to hold the transfer of these numbers hostage while looking to its tariff for authority for payment of pre-petition debt is unfounded in law and inequitable in result.

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<sup>9</sup> . See also *In re Personal Computer Network, Inc.*, 85 B.R. 507 (Bankr. N.D. Ill.), appeal den'd., 89 B.R. 19 (N.D. Ill. 1988).

In effect Bell would have this court sanction blackmail at its worse [sic] or priority over other creditors at its best by allowing Bell to recover a pre-petition unsecured claim in this manner. The very purpose of the bankruptcy laws is to suspend the *status quo* of the rights and obligations between the debtor and its creditors.<sup>10</sup>

IDT Winstar believes that the Bankruptcy Court would agree that Verizon is not afforded any special “constructive assumption” rights based on IDT Winstar’s rejection of the relevant Verizon contracts, but, in any event, that matter is for the Bankruptcy Court. Nothing in FCC precedent requires the Commission to interpret and make findings with respect to bankruptcy laws. The FCC is obliged to interpret the Communications Act in ways that minimize conflicts with other federal statutes, but it is plainly not obligated -- indeed Congress has not delegated to it the responsibility -- to render interpretations and findings under those other statutes.

Significantly, the *Winstar* Bankruptcy Court recognized the separate, yet complimentary purpose of each forum when it explicitly declined to rule on matters arising under the Communications Act. In its April 19, 2002 Order, appended to Qwest’s comments, the Bankruptcy Court states:

Nothing in this order shall constitute a ruling on the rights or obligations (if any) of any party ... under any regulatory statute.<sup>11</sup>

The Bankruptcy Court in fact expressly acknowledged that there may be additional obligations triggered by the Communications Act even after rejection of ILEC contracts:

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<sup>10</sup> *Id.* at 509.

<sup>11</sup> *In re Winstar Communications, Inc.* No. 01-1430 (Bank. D. Del.)(JCA), Order on Trustee’s Motion for an Extension of Time to Assume or Reject Executory Contracts and Leases, and Order Denying Motion of Winstar Holdings, LLC to Enforce Injunction Against Stopping Services to Debtors Before the Cutoff Date (Apr. 19, 2002).

First, I want to say that *anything this Court does cannot and should not and will not affect the federal Telecommunications Act. The parties still have whatever rights or obligations they have under that act.* \* \* \* If a contract or lease is not assumed, it is deemed rejected. The other party, the third party to any rejection or deemed rejected lease or contract can terminate its service and/or take possession of its property *subject, again, to any restrictions in the Telecommunications Act.*<sup>12</sup>

The Commission is thus free to exercise its proper jurisdiction to rule on IDT Winstar's Petition and to enforce the Communications Act and avoid expanding the scope of that ruling by addressing the extraneous bankruptcy-related issues raised by Verizon.

**C. Verizon's Tariff, And The Facts Of This Proceeding Are Not Consistent With Section 365**

Verizon claims "[its] tariff is entirely consistent with section 365's requirement of indebtedness associated with an executory contract that is being assumed and assigned."<sup>13</sup> However, as mentioned above, the Bankruptcy Court has found no assumption. This alone demonstrates that the facts are not covered by Section 365 or Verizon's interpretation of its tariff. Verizon states that a "classic example of an assignment" is where "a purchasing carrier looks to step directly into the shoes of a bankrupt carrier - taking on its service arrangements and connections and expressly assuming the bankrupt carrier's liabilities - with no more than a name change."<sup>14</sup> In the present matter, IDT Winstar did not undertake Old Winstar's "service arrangements," *i.e.*, its interconnection agreements. Second, IDT Winstar's intention to retain "connections" is consistent with

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<sup>12</sup> *In re Winstar Communications, Inc.* No. 01-1430 (Bank. D. Del.)(JCA), April 15, 2002, Hearing Transcript at 66-67 (emphasis supplied)

<sup>13</sup> Verizon Comments and Counter Petition at 27.

<sup>14</sup> *Id.*

the Commission's admonition to avoid a disconnect/reconnect scenario<sup>15</sup> (which Verizon has threatened would happen if subscribers were moved to new circuits) and should not be construed against IDT Winstar. Third, IDT Winstar has expressly *not* assumed Old Winstar's debt and expressly rejected the debt when it rejected the contracts associated with the debt. Fourth, IDT Winstar's actions to set up its new operating company with the appropriate telecommunications licenses<sup>16</sup> demonstrate that IDT Winstar has done much more than "a name change." Ultimately, IDT Winstar asserts that the Commission should decline to act on the bankruptcy issues presented by Verizon. However, if the Commission decides to address the issue, IDT Winstar urges the Commission to find that the relief requested in IDT Winstar's Petition may be granted under the facts of this proceeding without conflicting with any finding it might make on the issue of whether the Communications Act excepts carriers from the rights afforded by Section 365 of the Bankruptcy Code.

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<sup>15</sup> Public Notice, Requirements for Carriers to Obtain Authority Before Discontinuing Service in Emergencies and Northpoint Communications, Inc. Authority to Discontinue Services, NSD File No. W-P-D-488; DA 01-1257; 16 FCC Rcd 10924 (May 22, 2001) ("Service Discontinuance Public Notice").

<sup>16</sup> See generally, Exhibit A – Declaration of Jean L. Kiddoo, "Reply Comments of Winstar Communications, LLC" (May 3, 2002).

### **III. THE COMMISSION SHOULD DENY POINT TWO OF VERIZON'S COUNTER-PETITION**

Verizon asks the Commission to determine “where one CLEC wishes to take over another’s service arrangement with nothing more than a name change, that constitutes ‘an assignment or transfer’ within the meaning of Verizon’s tariffs, so that the assignee/transferee CLEC must assume the outstanding indebtedness of the prior CLEC for such services....” The Commission should deny this request for several reasons. First, it is nothing more than a transparent attempt by Verizon to take a second bite at the “assignment apple.” However, even if the Commission were to consider Verizon’s Counter-Petition, for the reasons stated herein, it should determine that IDT Winstar’s actions do not constitute “an assignment or transfer” within the meaning of Verizon’s tariffs.

#### **A. The Commission Should Not Permit Verizon A Second Bite At The "Assignment Apple"**

Verizon can close its eyes, click its heels three times and repeat “IDT Winstar assumed Old Winstar’s contracts” all it wants: it knows that as a matter of law, the Bankruptcy Court determines whether or not an assumption has taken place. Verizon also knows that the Bankruptcy Court has not found that IDT Winstar assumed the Old Winstar/Verizon contracts. Desperate in its search to find a friendly forum, Verizon turns to the Commission to seek a “constructive assumption” and gain the benefits of an actual assumption even where the deciding court has not found one. The Commission should not grant this blatant attempt at forum shopping and deny Verizon’s Counter-Petition and thus deny Verizon’s underhanded attempt to undermine the authority of the Bankruptcy Court.

**B. IDT Winstar's Actions Do Not Constitute "An Assignment Or Transfer" Within The Meaning Of Verizon's Tariffs**

IDT Winstar strenuously objects to Verizon's characterization of the transfer of subscribers of Old Winstar to IDT Winstar as a "name change" and the implication that the transaction resulted in an assumption of the contracts under which Old Winstar received service. Moreover, such a characterization is inconsistent with the Commission's use of the term "name change" (and the legal and regulatory implications of when a "name change" has taken place) within the context of a subscriber transfer. If the Commission concludes that IDT Winstar's acquisition of Old Winstar's subscribers and the request for the continued use of the facilities that serve those subscribers is an "assumption" within the meaning of Verizon's tariffs, it would eviscerate the Commission's subscriber transfer regulations by effectively obliging most carriers that acquire subscribers from an ailing or bankrupt carrier to acquire the previous carrier's debt associated with the subscribers. Moreover, because such a sea change in policy would not help Verizon achieve its alleged goal - making creditors whole - its implementation would not result in the benefit Verizon seeks. For these reasons, the Commission should conclude that IDT Winstar's actions do not constitute "an assignment or transfer" within the meaning of Verizon's tariffs.

**1. IDT Winstar's Actions Are Far More Than A "Name Change"**

IDT Winstar strenuously objects to Verizon's characterization of the company's acquisition of Old Winstar's subscribers and IDT Winstar's intended seamless transition of those subscribers and the facilities that serve them to IDT Winstar as "a name change." In its unyielding effort to distort the facts of the case, Verizon takes IDT Winstar's

description of the ease by which Verizon could *provision* the subscribers of Old Winstar to IDT Winstar (“Winstar believes the provisioning of these circuits will not require any physical changes in the network configuration being used to serve these customers today, and requires only that Verizon change the billing information associated with the with the listed circuits (a billing change only or ‘Record Order’) in order to undertake the transition of these circuits to [IDT] Winstar.”)<sup>17</sup> to distort the nature of the *transaction* between Old Winstar and IDT Winstar. Verizon’s characterization of the transaction as no more than a “name change” implies that the tariff’s “assumption provision” should apply because the Old Winstar/IDT Winstar transaction is some sort of scam - which Old Winstar simply decided to change its name to unburden itself from its debt. Verizon’s characterization could not be farther from the truth - something the company conveniently ignores whenever it suits its purpose. Indeed, if the actions taken by IDT Winstar constitute a “name change” and thus compel the obligations associated with an “assignment,” then virtually all subscriber acquisitions would constitute an assignment under the Commission’s subscriber mass migration regulations.

IDT Winstar is a new, distinct entity, as different and from Old Winstar as any other CLEC is. For example, IDT Winstar is a new and *different* company with *different* executives, *different* (or transferred) licenses to provide telecommunications service at the state and federal level, *different* interconnection agreements (including new agreements with Verizon), *different* tariffs (albeit tariffs that reflect the terms and conditions Old Winstar provided service under) which has undertaken all state and federal subscriber migration requirements to ensure that subscribers formally served by Old Winstar would

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<sup>17</sup> Letter from Steven Murray to Antonio Yanez and Maryann Howell, February 26, 2002.

now be served by IDT Winstar. Indeed, if a subscriber transfer to a different company with different executives, different licenses and different tariffs constitutes nothing more than “a name change,” it is difficult to imagine what, if any, subscriber transfer would fall outside Verizon’s broad characterization.

Perhaps most importantly, Verizon's characterization of the Old Winstar/IDT Winstar transaction as a "name change" is inconsistent with the Commission's use of the term and concept within the context of a subscriber migration. In the Commission's Customer Migration Order,<sup>18</sup> the Commission revised its procedures for when one carrier acquires the subscribers of another. In the Subscriber Migration Order, the Commission stated, "[W]hen a carrier is simply undergoing a *name change*, it is not in fact acquiring customers through a sale or transfer, and therefore it need not comply with these procedures."<sup>19</sup> It is undisputed that IDT Winstar filed a request with the Commission and all applicable state public utility commissions to acquire Old Winstar’s subscribers.<sup>20</sup> Verizon has not opposed any state or federal application on the grounds that the transfer was not necessary because there was only a “name change.” Further, the Commission, by accepting and granting the subscriber transfer has, *ipso facto* recognized that the transfer is not a "name change" as this term has been applied to subscriber transfers. Therefore, since the characterization of the Old Winstar/IDT Winstar transaction as a “name change”

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<sup>18</sup> First Report and Order In CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129, In the Matter of 2000 Biennial Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket no. 00-257; CC Docket No. 94-129; 11 FCC Rcd 11218 (“Customer Migration Order”).

<sup>19</sup> *Id.* at ¶ 13.

<sup>20</sup> *See generally*, Exhibit A – Declaration of Jean L. Kiddoo, “Reply Comments of Winstar Communications, LLC” (May 3, 2002).



does not apply, any action taken by the Commission under Point II of Verizon's Counter-Petition could not apply to IDT Winstar.

**2. If Granted, Verizon's Counter-Petition Will Disrupt And Harm The Orderly Transfer of Subscribers from Ailing or Bankrupt Carriers and Increase Subscriber Disconnections**

IDT Winstar believes that placing the issue in the context of subscriber transfers and service discontinuance frames the issue in a manner that permits the Commission to act expeditiously on IDT Winstar's Petition without being forced to address the extraneous bankruptcy issues raised by Verizon. In the Commission's Subscriber Migration Order, it stated, "Given the dynamic marketplace, and the likelihood that carriers will continue to buy, sell, and transfer customer lines in the future, we believe it is appropriate to streamline our carrier change rules to ensure that they do not inadvertently inhibit routine business transactions ...."<sup>21</sup> If the Commission were to adopt Verizon's definition of when an assumption takes place, IDT Winstar believes the Commission would inhibit these transactions through one of the following: (1) carriers will simply choose not to acquire subscribers from bankrupt carriers, thus resulting in an increase in subscriber disconnections; (2) carriers would have to acquire subscribers but would then be forced to provision them through new facilities, leading to service disruptions which would, in turn, increase costs and diminish carrier interest in engaging acquiring subscribers through transfers; or (3) subscriber transfers could be made only to carriers (such as Verizon) that can provide service solely through their own facilities. IDT Winstar requests that if the Commission considers this point of Verizon's Counter-Petition, it find that Verizon must act in accordance with its subscriber migration and

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<sup>21</sup> Subscriber Migration Order at ¶ 2.

service discontinuance policies to encourage a seamless transfer from one carrier to another and may not condition the continued use of circuits, currently serving the effected subscribers, on the payment of Old Winstar's debt.

The policy of the Subscriber Migration Order is further magnified by the Commission's policy in the Service Discontinuance Public Notice: "[T]o assist carriers that are disconnecting service in transitioning customers to other providers offering the same or comparable service in as seamless a manner as possible"<sup>22</sup> \*\*\* These regulations are designed to avoid unexpected service disruptions as much as possible, even when resulting from a carrier's insolvency."<sup>23</sup> IDT Winstar asserts that Verizon has acted in a manner that is inconsistent with this mandate. We believe that Verizon, angered over its inability to recover outstanding debts from Old Winstar has used its dominant control of the underlying facilities that Old Winstar uses (and IDT Winstar needs) to prevent the seamless transfer of Old Winstar's subscribers to New Winstar. Verizon's actions reek with the stench of abuse of power, and it is imperative that the Commission step in and clarify that even in the face of a dispute between carriers, consumers should not be held hostage. The following examples demonstrate how Verizon has acted contrary to the Service Discontinuance Public Notice.

The Service Discontinuance Public Notice "urges all carriers to assist carriers that are discontinuing service in transitioning customers to other providers offering the same or comparable service in as seamless a manner as possible."<sup>24</sup> However, IDT Winstar has presented evidence to this Commission that Verizon has flat-out refused to offer a

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<sup>22</sup> See, Service Discontinuance Public Notice.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

seamless transition for the customers of Old Winstar to IDT Winstar by transferring the circuits serving the subscribers from Old Winstar to IDT Winstar, despite the fact that this Commission and applicable state commissions have authorized the subscriber transfer.<sup>1</sup>

The Service Discontinuance Public Notice states, “ILECs, CLECs and IXC’s should also establish migration procedures that facilitate quick and seamless transfer of customers to comparable service from alternate providers.”<sup>25</sup> IDT Winstar has presented evidence to this Commission that Verizon has threatened that a customer transfer from Old Winstar to IDT Winstar will result in a “disconnect/reconnect scenario,” which this Commission *explicitly* sought to avoid.

Furthermore, the Service Discontinuance Public Notice states, “To minimize disruption to the end user, ILECs should also consider continuing to provide wholesale service to carriers seeking permission to discontinue service until a transition is made to a new provider, particularly when alternative providers have taken steps to migrate customers from the bankrupt carrier.”<sup>26</sup> IDT Winstar asserts that this is exactly as it intended to do: have Verizon provide service to Old Winstar until all subscribers were transferred to IDT Winstar, which has taken all required steps to acquire Old Winstar’s subscribers. Additionally, IDT Winstar agreed to pay, in advance, for all services provided until the transition was completed. However, while Verizon has transitioned those Old Winstar subscribers that chose to switch to other carriers (including Verizon), Verizon has positively refused to transition the Old Winstar subscribers that chose to switch to IDT Winstar. This is, in no uncertain terms, unjust and unreasonable

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<sup>25</sup> *Id.*

discrimination against IDT Winstar and is contrary to the Commission's explicit guidelines in the Service Discontinuance Public Notice.

### **3. Granting Verizon's Counter-Petition Will Not Benefit Creditors of Bankrupt Carriers**

Verizon's Counter-Petition aims to gain sympathy from those who find bankruptcy fundamentally unfair. Indeed, IDT Winstar's corporate parent, IDT Corporation, much like Verizon, often finds itself one of thousands of unsecured creditors to individuals and companies that have declared bankruptcy. IDT Corporation holds no great affection for those companies that declare bankruptcy and may never remit payment in full for services provided. However, it is an unfortunate reality that when a company incurs debts and declares bankruptcy, its creditors may never be made whole. All that may be done to make creditors somewhat whole is to sell the assets for as much as the market will bear and distribute the funds to the creditors in accordance with bankruptcy law. However, the Commission should recall that it was IDT Winstar's decision to acquire Old Winstar that effectively kept the company's creditors from "losing out" any further. When carriers such as Verizon were required by the Bankruptcy Court to continue providing service to Old Winstar with little or no real prospect of ever getting paid, IDT Winstar stepped in, stopped the ILECs bleeding and began paying Old Winstar's foregoing bills, in advance. Despite this, Verizon expects IDT Winstar to pay for Old Winstar's debts prior to the acquisition. "Ungrateful" is one of the milder terms that apply to Verizon's actions.

Whether the rules that govern bankruptcy are fair is for Congress - not this Commission - to decide. Verizon implies that it is looking to impose a system that treats

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<sup>26</sup> *Id.*

creditors more fairly, but what it is really attempting is to implement a system that treats ILECs more fairly and permits them to “game the system” and effectively jump to the head of the line and secure payment before other creditors by holding a bankrupt carriers’ subscribers hostage and refusing to release them until a ransom has been paid by the acquiring carrier. While this Commission has the authority to regulate telecommunications carriers, IDT Winstar believes it is improper for it to expand the rights of telecommunications carriers in bankruptcy proceedings at the expense of other creditors. Furthermore, to expand ILECs rights in the manner proposed by Verizon is unjust and unreasonable, harmful to competition and consumers and contrary to the Commission’s Service Discontinuance Public Notice and its Subscriber Migration Order.

Even if the Commission decides to take some action to demonstrate its displeasure with the nation’s bankruptcy laws, the proposals set forth in Verizon’s Counter-Petition will not achieve Verizon’s alleged goal: making creditors whole. Under Verizon’s Counter-Petition, carriers that acquire bankrupt carriers’ subscribers and continue to use the underlying circuits that serve those subscribers would assume the indebtedness associated with those subscribers. As stated above, IDT Winstar believes that such an outcome will result in one of the following: (1) faced with acquiring the debt associated with the subscribers, carriers will simply choose not to acquire subscribers from bankrupt carriers, thus resulting in an increase in subscriber disconnections; (2) carriers will acquire subscribers but will be forced to provision them through new facilities, leading to service disruptions which will, in turn, diminish carrier interest in acquiring subscribers through transfers and thus lead to increased disconnections; or (3) subscriber transfers could be made only to carriers (oddly enough, like Verizon) that can

provide service through their own facilities. Ultimately, if the Commission agrees with Verizon's tariff argument, subscriber transfers will be reduced significantly if not eliminated, subscriber disconnections will increase and, as a result, *creditors still will not be made whole*.

#### **4. Verizon's Ambiguous Tariff Should Be Construed Against It**

It is well settled that vague and ambiguous tariff provisions are construed against the carrier.<sup>27</sup> The simple fact that Verizon is compelled to seek a declaratory ruling on the proper interpretation of its tariff demonstrates that its tariff sections in question are ambiguous. Moreover, by its own admission, Verizon has acted contrary toward IDT Winstar and other carriers regarding its tariff's alleged obligation to "assume [] all outstanding indebtedness" as a precondition to maintaining service continuity.<sup>28</sup> Thus, based on the company's past actions, how was IDT Winstar (or any carrier) supposed to understand the proper interpretation of Verizon's tariff? Arguably, Verizon's tariff is so ambiguous even the company itself does not know what it means. An alternative explanation is that the company only chooses to follow the provision when it suits their interest. Under either approach – ambiguity or duplicity – Verizon's argument fails. Yet even if the Commission somehow chose to grant the relief Verizon seeks, it should apply

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<sup>27</sup> See *United States v. ICC*, 198 F.2d 958, 966 (D.C. Cir. 1952) ("Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier."); *Komatsu v. States Steamship Co.*, 674 F.2d 806, 811 (9th Cir. 1982); see also *Bell Atlantic Corp. v. Global NAPs, Inc.*, File No. E-99-22-R, Order on Reconsideration, 15 FCC Rcd 5997, ¶ 22 (2000) ("[A]mbiguous tariff provisions must be construed against the drafting carrier."); *Theodore Allen Communications, Inc. v. MCI Telecomm.*, File No. E-93-094, Memorandum Opinion and Order, 12 FCC Rcd 6623, ¶ 26 (CCB, 1997); *The Associated Press*, File No. TS-11-74, Memorandum Opinion and Order, 72 FCC 2d 760, ¶ 11 (1979) ("Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carrier controls, for the user cannot be charged with knowledge of such intent or with the carrier's canon of construction . . . . However, if there is ambiguity in tariffs they should be construed against the framer and favorably to users . . . .") (quoting *Commodity News Services, Inc.*, 29 FCC 1208, 1213 (1960)).

only prospectively and should not be applied to the issues presented in IDT Winstar's Petition.

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<sup>28</sup> See, "Reply of Winstar Communications, LLC," at 18 (May 3, 2002).

#### **IV. THE COMMISSION SHOULD DENY POINT THREE OF VERIZON'S COUNTER-PETITION**

Verizon also requests “to the extent it does not do so separately by issuing a clarification of its previous public notice reflecting the obligation of carriers to provide notice to affected customers, the Commission should clarify the circumstances under which carriers in bankruptcy are obligated to provide notice of possible discontinuance or transfer to their customers.” Neither IDT Winstar’s Petition nor Verizon’s Counter-Petition raise the issue of whether Old Winstar acted in accordance with the Commission’s guidelines. Verizon’s request effectively serves as a request for rulemaking or a motion for clarification. Under either scenario, the Commission should deny the request in Verizon’s Counter-Petition on the grounds of that it is procedurally deficient. In the event the Commission chooses to address the issue, IDT Winstar presents several issues and concerns the Commission should take into consideration. Furthermore, if the Commission make any findings as to Verizon’s point, IDT Winstar requests that the Commission clarify that Old Winstar did not violate any newly created obligations and that these obligations only apply going forward, to carriers not yet in bankruptcy.

##### **A. Verizon’s Request Is Procedurally Deficient**

Verizon seeks a “clarification” to impose an obligation on bankrupt carriers to provide its subscribers with some sort of notice of “potential discontinuance” on notice. Yet IDT Winstar’s Petition does not raise the issue of whether Old Winstar acted in accordance with the Commission’s guidelines, as set forth in the Service Discontinuance Public Notice. Indeed, it is clear that the company acted properly. It



seems that Verizon is either seeking a rulemaking on this very broad, significant issue or, at the very least, a clarification of the Service Discontinuance Public Notice. In either case, Verizon's request would be procedurally deficient. Therefore, the Commission should deny Verizon's request. If Verizon remains interested in a "clarification," it may a Motion seeking a proposed rulemaking or clarification, thus giving all interested parties an opportunity to comment on this issue.

**B. If The Commission Acts On Verizon's Request, It Should Take Certain Issues and Concerns Into Consideration**

In the event the Commission does not find Verizon's request procedural deficient and decides to address the issue presented, IDT Winstar urges the Commission to account for the many and varied circumstances of carriers in bankruptcy, which Verizon has declined to do its Counter-Petition.

The following are only a few of the concerns IDT Winstar suggests the Commission should consider if it attempts to address the issue put forth by Verizon. First, for many bankrupt companies, subscribers are its primary asset. To require an ailing or bankrupt carrier to notify its subscribers of a "potential discontinuance" before it has had sufficient time to sell this asset (and thus provide secure cash for its creditors) would only further diminish the value of the entity as a whole, thus meaning that the notice has harmed – rather than helped - creditors. Ultimately, IDT Winstar recommends that if the Commission address this issue, it undertake a far more reasoned approach than Verizon as to the issue of how the value of the bankrupt entity will be affected by being forced to take action that may effectively divest it of its assets, and how that divestiture will effect all creditors, not just ILECs.

**C. Verizon's Request Raises Concerns That Compelling Notice Will Lead to Abuse by A Bankrupt Carrier's Competitors**

In its Service Discontinuance Public Notice, the Commission “admonishes all carriers ... to fully comply with the letter and intent of the Commission’s regulations implementing section 214. These regulations are designed to avoid unexpected service disruptions as much as possible, even when resulting from a carrier’s insolvency, by ensuring that customers receive adequate notice of impending discontinuances of service so that they may arrange for alternate service.” Verizon’s Counter-Petition implies that simply because a carrier has declared bankruptcy, it be required to notify its subscribers of the threat of discontinuance. However, simply declaring bankruptcy should not be equated to “impending discontinuances of service” and thus compel subscriber notice. Additionally, there may be state utility requirements that impact any action the Commission might take, so it would need to ensure that its actions conformed to the obligations under state law.

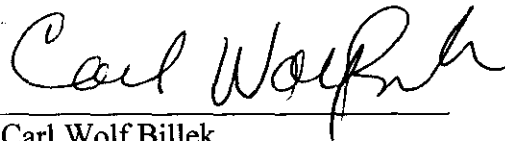
IDT Winstar is also concerned that where a creditor is also a competitor, Verizon’s request creates a potential for abuse. For example, Verizon and other ILECs have repeatedly accused IDT Winstar of creating an emergency by not notifying its subscribers of the possible discontinuance of service.<sup>29</sup> Yet it has always been IDT Winstar’s intention to serve these customers and the company has never believed that there has been a legal basis under which its underlying carriers could discontinue underlying services. For Old Winstar to have been required to provide notice of a “potential disconnection” to subscribers IDT Winstar has every intention of serving

would have been overwhelmingly anti-competitive, unjust and unreasonable. Any action the Commission may undertake on this issue should account for the harm that a forced, or premature “potential disconnection” notice will have to an ailing or bankrupt carrier, its creditors and its customers. Moreover, any action taken should explicitly state that Old Winstar did not violate any newly created obligations and that these obligations only apply going forward.

### **CONCLUSION**

For the foregoing reasons, IDT Winstar requests that the Commission deny Verizon’s Counter-Petition. It also requests that the Commission grant IDT Winstar’s Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Carl Wolf Billek", written over a horizontal line.

Carl Wolf Billek  
Winstar Communications, LLC  
520 Broad Street  
Newark, New Jersey 07102-3111  
(973) 438-1000

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<sup>29</sup> (“It is only where, as IDT has done in this case, the purchasing CLEC waits until the last moment to provide notice to customers or to seek new service arrangements that the specter of service disruption is raised.”) Verizon Comments and Counter-Petition at 8.

### CERTIFICATE OF SERVICE

I, Carl Wolf Billek do hereby certify that on this 13<sup>th</sup> day of May 2002, I caused true and correct copies of the following Comments of Winstar Communications, LLC to be served via Overnight Mail upon the following persons:

Chairman Michael K. Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room 8-B201  
Washington, DC 20554

Commissioner Kevin J. Martin  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room 8-C302  
Washington, DC 20554

Commissioner Kathleen Q. Abernathy  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room 8-B204  
Washington, DC 20554

Commissioner Michael J. Copps  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
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Dorothy Attwood  
Chief, Wireline Competition Bureau  
Federal Communications Commission  
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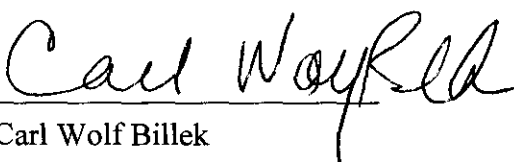
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